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APPENDIX A

No. 80-7676

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

AMERICAN FEDERATION of GOVERNMENT EMPLOYEES, LOCAL 2017, *et al.*,
Plaintiffs-Appellants,

v.

HAROLD BROWN, CLIFFORD ALEXANDER, JR., *et al.*,
Defendants-Appellees,

PAN AMERICAN WORLD AIRWAYS, INC.,
Intervenor-Appellee.

July 12, 1982

Appeal from the United States District Court
for the Southern District of Georgia

Before MORGAN, HILL and KRAVITCH, Circuit Judges.

JAMES C. HILL, Circuit Judge:

The appellants, Local 2017 of the American Federation of Government Employees [1] and three former civilian employees of the Department of the Army at Fort Gordon, Georgia, filed a complaint in the United States District Court for the Southern District of Georgia, seeking temporary and permanent injunctive relief enjoining the United States Army from contracting out certain work performed by civilian employees at Fort Gordon.[2] The

[1] Local 2017 is a labor organization represening certain employees of the Department of the Army at Fort Gordon.

[2] The Secretaries of Defense and the Army, the Commanding General of the United States Army Training and Doctrine Com-

complaint alleged *inter alia* that the defendants' decisions to contract out the work to Pan American World Airways (hereinafter Pan Am) violated sections 806(a)(1) and 806(a)(2)(A) of the Department of Defense Authorization Act, 1980. Pub.L.No.96-107, 93 Stat. 803 (1979), 10 U.S.C. § 2304 note (Supp. III 1979). The Disttrict Court dismissed the complaint on the basis that the court lacked jurisdiction, and that the appellants lacked standing to sue. For the reasons stated below we affirm the decision of the District Court.

I

The general policy of the federal government is to rely on competitive private enterprise to supply the products and services it needs except when comparative cost analysis indicates that procurement from a private source is not as cost-effective as in-house performance.[3] This policy is explicitly set forth in Office of Management and Budget (OMB) Circular No. A-76, 44 Fed. Reg. 20, 556 (1979), *revised*, 45 Fed.Reg. 69,322 (1980).[4] OMB Circular No.

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mand, the Commander of the U.S. Army Operations at Fort Gordon, and a contracting officer were each named defendants in their official capacities. Pan American World Airways, Inc., the awardee of a contract to perform the work in question was granted permission by the court to intervene in the action as a defendant.

[3] In-house performance is also allowed when national defense needs require it; contract performance would cause unacceptable delay or disruption of an essential program; or no satisfactory private source exists that is capable of providing the required product or service.

[4] The government's policy of acquiring needed products and services from private sources was first expressed in Bureau of Budget Bulletins issued in 1955, 1957 and 1960. In 1966 Circular No. A-76 was issued and for the first time, prescribed the policy and implementing guidelines in a permanent directive. The Circular in effect at the time the present case arose was issued March 29, 1979. This circular is not materially different from the current version issued September 26, 1980.

A-76 also provides guidelines for the implementation of the policy.

In 1979 Congress enacted the Department of Defense Authorization Act, 1980. Pub.L.No.96-107, 93 Stat. 803 (1979), 10 U.S.C. § 2304 note (Supp. III 1979).[5] Section 806(a) of the Act addressed the matter of the Department of Defense converting from in-house performance of commercial and industrial functions to performance of these functions by private contractor. Section 806(a) had the effect of elevating certain aspects of Circular A-76 to the status of law. Specifically, this provision stated that no functions being performed by Department of Defense personnel could be converted to performance by a private contractor: (1) to circumvent any civilian personnel ceiling: (2) without prior notification to Congress of the decision to study the function for possible conversion; and (3) without certification to Congress of the in-house cost calculation.[6]

The present case arose from the decision by the Department of the Army to contract out certain functions

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[5] This Act was an appropriations statute for fiscal year 1980 only. It thus has no present force or effect.

[6] Section 806(a) read:

> (a) During fiscal year 1980, no commercial or industrial type function of the Department of Defense that on the date of the enactment of this Act is being performed by Department of Defense personnel may be converted to performance by a private contractor—
>
> (1) to circumvent any civilian personnel ceiling, and
>
> (2) unless the Secretary of Defense shall provide to the Congress in a timely manner—
>
> (a) notification of any decision to study such commercial or industrial type function for possible performance by a private contractor, together with a certification that the government in-house cost calculation for the function is based on an estimate of the most efficient and cost effective organization for in-house performance.

performed by the Directorate of Industrial Operations and Housing at Fort Gordon, Georgia. These functions included housing, maintenance, supply and service, and transportation. Prior to making the contracting out decision the Army conducted an analysis of the functions to determine whether a cost savings could in fact be achieved by conversion to a private contractor. As a part of this analysis the Army first performed a study to determine the most efficient and cost-effective organization for in-house performance of these functions. The Army then solicited and received cost proposals from private contractors for the performance of the functions. The cost proposal offered by Pan Am was determined to be the lowest of all the contractors. The Army compared Pan Am's cost proposal with the cost calculation for in-house performance and determined that an estimated 58-month savings of approximately $32 million could be achieved by contracting with Pan Am for the performance of the functions.

The results of the Army's study were reported to Congress, including a certification that the Army's in-house cost calculation for the functions was based on an estimate of the most efficient and cost-effective organization for in-house performance. The Army's tentative decision to contract out to Pan Am was also reported to Congress. Congress raised no objections to the in-house cost caculations or to the decision to contract out.

The Army, consequently, awarded the contract to Pan Am. On the same day that the contract was awarded reduction-in-force notices were sent to 618 civilian employees at Fort Gordon whose positions would be eliminated because of the contract.[7] The appellants then

[7] As was required under the contract Pan Am offered all displaced civilian employees the right of first refusal for employment openings under its contract in positions for which they were qualified. Each of the individual plaintiffs in this action was offered a position with Pan Am.

brought this action to enjoin the Army from proceeding with the conversion to Pan Am.

The appellant's complaint alleged that the conversion violated Public Law 96-107, Section 806(a) because it was done to circumvent civilian personnel ceilings, and because the Army's in-house cost calculations failed to provide a proper estimate of the most efficient and cost-effective organization for in-house performance.

The District Court did not consider the complaint on the merits, but rather held a hearing on the threshold issues of jurisdiction and standing. The court concluded that it was without jurisdiction because the Army's conversion decision was not subject to judicial review. The court further concluded that the plaintiffs lacked standing because they were not within the zone of interests protected by Section 806. Upon the dismissal of the plaintiff's complaint this appeal was taken.

III

The two issues before us on appeal are first, whether district courts have judicial review over alleged violations of Section 806(a) and second, whether affected civilian employees and their labor organization have standing under Section 806(a) to challenge a decision of the Department of the Army to convert from in-house performance of certain base functions to performance by private contractor.

The appellants argue that pursuant to the Administrative Procedure Act (APA)[8] judicial review of the Army's decision is available. They contend that Public Law 96-107 evinces no statutory preclusion of judicial review, and furthermore, that the Army's contracting decision is not committed to agency discretion by law.

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[8] 5 U.S.C. §§ 701-706 (1976).

There is no question that the APA affords judicial review of agency action to any person adversely affected or aggrieved by an agency action[9] except to the extent that, (1) statutes preclude judicial review, or (2) agency action is committed to agency discretion by law.[10] Public Law 96-107 contains no explicit preclusion of judicial review such that the first exception is clearly inapplicable to the present case.[11] Whether the second exception applies depends upon an analysis of the nature of the agency decision involved. As we stated in *Bullard v. Webster*, 623 F.2d 1042 (5th Cir. 1980):

> In the absence of a statute that explicitly precludes judicial review, an agency action is committed to the agency's discretion and is not reviewable when an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed.

623 F.2d at 1046. In *Bullard* we indicated three criteria useful in making a determination of whether an action is committed to agency discretion: (1) the broad discretion given an agency in a particular area of operation, (2) the extent to which the challenged action is the product of political, economic or managerial choices that are inherently not subject to judicial review, and (3) the extent to which the challenged agency action is based on some special knowledge or expertise.[12] *Id.* The ap-

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[9] 5 U.S.C. § 702 (1976).

[10] 5 U.S.C. § 701(a) (1976).

[11] In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967) the Supreme Court noted that "the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation . . ." and that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."

[12] These three criteria were taken from the Third Circuit's opinion in *Local 2855, AFGE v. United States*, 602 F.2d 574 (3d Cir. 1979). *Local 2855* essentially raised the same issue as the present case. The court held that the Army's contracting out decision was committed to agency discretion and thus not subject to judicial review.

plication of these criteria to the case at hand convinces us that the decision to contract out was indeed committed to the discretion of the Army and is thus not subject to judicial review.

We agree with the finding of the District Court that Section 806 vests the Army with broad discretion to make contracting out decisions and provides no legal standard for the court to apply. As the District Court stated:

> Section 806 is a statement policy and legislative intent. It is a mandate from the legislative branch to the executive branch, but it is not replete with formulae or discernable (sic) guidelines against which the agency decision may be measured.

AFGE, Local 2017 v. Brown, No. CV 180-136 at 12 (S.D. Ga. August 29, 1980).

There is no dispute that in enacting Section 806 Congress sought to elevate some aspects of existing practice and procedure under OMB Circular A-76 to the status of law.[13] Section 806 in no way affected the nature of the conversion decision and imposed no new standards to guide the military's discretion. Except for the requirements of congressional notification and reporting, there were no restrictions on conversions in Section 806 that are not in OMB Circular A-76. Indeed, the OMB Circular is far more detailed and offers far more by way of guidelines for decisions than does Section 806. Thus, a number of cases concerning Army conversion decisions made pursuant to OMB Circular A-76 are extremely persuasive. All of the courts which have considered the issue have held that conversion decisions made by the Department of Defense officials under Circular A-76 are committed to agency discretion and are not subject to judicial review. *Local 2855, AFGE v. United States*, 602 F.2d

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[13] Our review of the legislative history convinces us that the overriding concern of Congress was to provide for increased congressional review and oversight of conversion decisions.

574 (3d Cir. 1979); *American Federation of Government Employees v. Stetson*, C.A. No. 77-2146 (D.D.C. July 25, 1979); *American Federation of Government Employees v. Hoffmann*, 427 F.Supp. 1048, 1082-84 (N.D.Ala.1976); and *AFGE, Local 1688 v. Dunn*, No. A-75-156 (D.Alaska Sept. 30, 1975), *aff'd on other grounds*, 561 F.2d 1310 (9th Cir. 1977).

In *Local 2855, AFGE*, the Third Circuit observed that pursuant to *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 St.Ct. 814, 820, (1971) the committed to agency discretion exception to judicial review is intended to be "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' [citation omitted]." 602 F.2d at 578-79. In applying this rule to OMB Circular A-76 the court concluded that the circular failed "to provide meaningful criteria against which a court may analyze the Army's decision." *Id.* In a similar vein the District Court in the case at hand concluded correctly that because Section 806 lacked discernible guidelines "a District Judge would have no law to apply in determining whether or not a decision made by the agency was correct." *AFGE, Local 2017* at 11-12.

The Army's contracting out decision is also an inappropriate subject for judicial review because the decision involves military and managerial choices inherently unsuitable for the judiciary to consider. As the Supreme Court noted in *Orloff v. Willoughby*, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed 842 (1954) "[j]udges are not in the business of running the Army . . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters." 345 U.S. at 93-4, 73 St. Ct. at 540.[14]

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[14] We expressed similar sentiments in *Mindes v. Seaman*, 453 F.2d 197, 199 (5th Cir. 1971) when he stated:

> Traditional judicial trepidation over interfering with the military establishment has been strongly manifested in an

In addition, the contracting out decision is based on the special expertise of the Army officials involved. Calculations of the most efficient and cost-effective way to perform a function at a military installation "are matters on which experts may disagree; they involve nice issues of judgment and choice." *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 78 SCt. 752, 2 L.Ed.2d 788 (1958). These issues are best resolved by the Army analysts rather than by the courts since, in the words of Justice Frankfurter, they "do not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment." *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 122, 59 S.Ct. 715, 724 (1939) (Frankfurter, J. concurring).[15]

The appellants argue further that the District Court erred in holding that they lacked standing to challenge the Army's contracting out decision. In view of our determination that the District Court was correct in finding that it lacked jurisdiction it is unnecessary to address the question of standing.

III

The judgment of the District Court is

AFFIRMED.

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unwillingness to second-guess judgments requiring military expertise and in a reluctance to substitute court orders for discretionary military decisions . . . . [T]he greatest reluctance to accord judicial review has stemmed from the proper concern that such review might stultify the military in the performance of its vital mission.

[15] We should also note that if a contracting out decision is in fact made on the basis of an erroneous calculation of the cost of in-house performance, or to circumvent civilian personnel ceilings, affected civilian employees and their labor representative are always free to bring such discrepancies to the attention of Congress and to seek legislative relief.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

Civil Action No. CV180-136

AMERICAN FEDERATION of GOVERNMENT EMPLOYEES, LOCAL 2017, JOHN C. CUMMINGS, STERLING DUNN, and JOHN E. GUILLEBEAU,
Plaintiffs,

v.

HAROLD BROWN, CLIFFORD ALEXANDER, JR., WILLIAM J. HILSMAN, WALTER L. MORRIS, JR. and DONN A. STARRY,
Defendants,

PAN AMERICAN WORLD AIRWAYS, INC.,
Defendant-Intervenor.

ORDER

Upon the findings, conclusions, and considerations expressed in open Court and upon the record in this case,

It appearing that the Court is without jurisdiction to consider the plaintiffs' complaint and that the plaintiffs have no standing to sue,

It is hereby ORDERED that the plaintiffs' application for preliminary injunctive relief is denied and the complaint dismissed.

Order entered at Augusta, Georgia, this 29th day of August, 1980.

/s/ Dudley H. Bowen, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Civil Action File No. CV180-136

AMERICAN FEDERATION of GOVERNMENT EMPLOYEES, LOCAL 2017, JOHN C. CUMMINGS, STERLING DUNN, and JOHN E. GUILLEBEAU,
Plaintiffs,

vs.

HAROLD BROWN, CLIFFORD ALEXANDER, JR., WILLIAM J. HILSMAN, WALTER J. MORRIS, JR., and DONN A. STARRY,
Defendants,

and

PAN AMERICAN WORLD AIRWAYS, INC.,
Defendant-Intervenor.

Before:

Honorable DUDLEY H. BOWEN, JR.,
District Judge

Augusta, Georgia
August 29, 1980—12:25 p.m.

APPEARANCES OF COUNSEL:

On behalf of the Plaintiffs:

TERRANCE P. LEIDEN, Esq.
DAVID GRILL, Esq.

On behalf of the Defendants:

EDMUND A. BOOTH, JR., Esq.

On behalf of the Defendant-Intervenor:

DAVID E. HUDSON, Esq.

THE COURT: This is a follow-up session from our Wednesday afternoon hearing. I told you that I would have a decision by 8:00 o'clock last night, but that was an impractical commitment. We didn't get through with our jury until 6:00 o'clock.

I have prepared some notes, and I will follow those notes and announce to those present my decision with respect to the case and particular with respect to the application for preliminary injunctive relief, and I will, of course, as I mentioned in these notes, I will enter a supplemental written memorandum opinion as soon as time permits.

On August 21st, 1980, the Plaintiffs filed a complaint seeking declaratory and injunctive relief against the Defendants. The Plaintiffs seek to enjoin preliminary and permanently the implementation of a proposed contracting of industrial and commercial service at Fort Gordon, Georgia, to Pan American Airways, Inc. Pan American has been determined by an agency appeal to be the best bidder for the services the Army seeks to contract out. Pan American has been allowed to intervene as a party in this case.

This order is necessarily brief because of the severe time requirements implied by the needs of the parties in this litigation. A supplemental written memorandum opinion will be entered. Because the timeliness of the Plaintiffs' action is an issue in this case for equitable relief, a statement of some of the undisputed facts showing the chronology of the developments leading to the case is important.

On December 15th, 1978, the Army released a request for proposed solicitation of bids for the commercial and industrial functions which were let to a private contractor at Fort Gordon. On November 9th, 1979, the Congress of the United States passed Public Law 96-107, which is Section 806(a) and (b) as part of the Department of Defense Authorization Act for fiscal year 1980. Pursuant to the mandates contained in Section 806, the Secre-

tary of the Army transmitted to the Congress the reports and notification required there in. Congress has not chosen to take any legislative action on the reports, and it appears that no committee of either House of Congress has conducted any extensive hearings thereon, and no individual member of Congress has objected. Because the proposed contracting of services originated in calendar year 1978 and the contract was not finally awarded to Pan Am until June 26th, 1980, no specific appropriation for this element of the budget of the Department of Defense has been included in any budgetary legislation.

The award of the contract to Pan American Airways was publicized locally, and the decision to award underwent an extensive review or appeal process. At least one of the Plaintiffs, Local 2017, stated publicly an intention to seek court action to halt the contracting process in July 1980. The complaint was not actually filed until August 21st. The Court conducted a hearing on the Plaintiffs' application for preliminary injunction on August 27th, 1980. No evidence was educed at the hearing because of the concern expressed by the Court regarding the threshold legal questions relating to jurisdiction, standing to sue, timeliness, legislative intent, and the observance of the constitutional separation of powers in the Federal system.

The date for implementation of the contractor's services, alerady once delayed by agreement during the appeals process, is September 1st, 1980. It is represented to the Court that the contract documents provide for a one million dollar penalty of like payment to Pan American in the event that the contractor's services do not begin on that date. The "phasing in" process started at Fort Gordon, Georgia, on July 1st, 1980, and Pan American entered into several subcontracts.

There are three individual Plaintiffs. The other Plaintiff is a local labor union of the American Federation of Government Employees. The membership of the union among the Fort Gordon employees is represented to the court at approximately 600 persons.

Exact figures are unavailable because there is no evidence to support them, but for the purpose of this order, it is assumed as follows: On September 1st, the contractor will undertake to perform many commercial and industrial services at Fort Gordon, Georgia, which were previously performed by Department of Defense civilian personnel. A large number of former Department of Defense civilian employees will be employed by the contractor; a significant number of Department of Defense civilian employees will be "laid off" pursuant to reduction in force notices sent on the 25th day of August. It should also be noted that the latter employees have received a tentative notice in reduction of force on June 26th, 1980.

With all of this in mind, it is, of course, appropriate to examine the statute, Section 806 of Public Law 96-107, which has become a focal point in this case. I will not quote the statute, but generally, it provides for the prohibition on conversion to private contractors of industrial and commercial functions previously performed by the Department of Defense to circumvent any civilian personnel ceilings, unless the Secretary of Defense shall provide to Congress in a timely manner notification of the proposed event and in certain cases, with regard to that event, a very extensive report to Congress on the potential economic and military mission effect and other effects that the proposal will have. This legislation provides to the executive branch an unmistakable prohibition from the legislative branch on the conversion of functions to private contractors in the absence of certain conditions. It is easily seen that no conversion may be made to circumvent civilian personnel ceilings established by Congress. It is equally clear that any conversion must not be made without prior notification, certification and extensive "effect" reports to Congress.

This is one of those cases in which the Court must carefully examine the intent of Congress and try as best it can to determine the intent that the legislature had in passing this legislation.

As contained in the report of the House Committee on armed services, House Report No. 96-106, the Committee and Congress were concerned "over the efficacy of conversions to performance by private contractors in some functions, and evidence that in many instances, the administration of civilian personnel ceilings is making conversion to private contracts, the only feasible method of getting the job done. Thus, the Committee included a provision that would require the Department of Defense to provide the Congress with more information and permit the Congress time to review decisions to contract out." That quote is lifted from page 136 of House Report 96-166. The District Courts, in determining legislative intent, may look to the reports of committees concerned with legislation to the Congress as a whole. Also, District Courts may look to the Congressional record of statements made from the floor of Congress, or in debate to define the intent of that body.

It appears that the salient features of Section 806 were contained in an amendment to legislation offered by Congressman Hanley to the House of Representatives on September 14th, 1979, that appears in the Congressional record of the House on September 14th, 1979, at page H-7912. While offering the amendment, Congressman Hanley stated, "I think we can all agree that decisions to contract out should be based on factors related to saving taxpayer money, factors such as cost and efficiency, rather than on the need to circumvent a personnel ceiling." After stating on page H-7913 that the former OMB Circular A-76 had been expanded and revised, Congressman Hanley stated, "I firmly believe that the cornerstone of the Federal Government's procurement policy should be cost effectiveness once certain mitigating factors have been considered."

Supporting Congressman Hanley's amendment, Congressman Kazen of Texas stated, "I therefore think that the Congress should have the final say as is provided for in this bill as to whether or not a particular category of work should be contracted out." To this, Congressman

Hanley replied, "Mr. Chairman, I am most appreciative of the gentleman's comments, and I thank him for his support. He puts the case very well."

The only significant change which the bill underwent after Congressman Hanley's amendment is the deletion of a 30-day legislative review period to which the House and Senate conferees agreed.

Moreover, a plain English and common sense reading of the words of the statute indicates the intent of Congress in its passage.

The intent of Congress in passing this legislation was to increase the efficiency and reduce the cost of military operations, to prevent the circumvention of civilian personnel ceilings, to require the Department of Defense to report to Congress in detail any proprosed conversions from the military to the private sector of commercial and industrial functions, and to retain the "final say as to whether or not a particular category of work should be contracted out."

I can discern no legislative intent to submit questions relating to economic effect on employees, economic effect on communities, practical effect on military mission, budgetary considerations, or broad monetary policy in the contracting of commercial and industrial military functions to the District Courts of the United States.

The intent of the Congress regarding restriction on conversion of commercial and industrial type functions from Department of Defense personnel to private contractors may also be gleaned from the Department of Defense Authorization Act for fiscal year 1981. Section 502 of the act is entitled "Strengthening of Restrictions on Conversions of Performance of Commercial and Industrial Type Functions from Department of Defense Personnel to Private Contractors." The title indicates a legislative objective to provide more strengent Congressional controls on contracting out than provided in Section 806 of Public Law 96-107.

Of particular significance to this case is that in enacting Section 502 of the 1981 Authorization, which Con-

gress characterized as stronger than Section 806 of the 1980 Authorization Act, the legislature specifically deleted a provision allowing a Government employee who receives a "reduction in force notice" as a result of a conversion to file suit in the United States District Court. Thus, I have deduced that Congress intended no right of action for Government employees under Section 806 of Public Law 96-107 or the subsequent act of similar import of fiscal year 1981.

Now, to examine the jurisdiction of the Court, I have observed that the absence of any legislative intent to submit such questions for judicial review is entirely consistent with the failure of Congress to specifically provide for jurisdiction over such matters in the Courts. The Courts of the United States are empowered to hear and determine only such cases in which jurisdiction is granted by statute. Here there is no such grant.

The Constitution of the United States and certain applicable statutes provide that the Courts of the United States shall have certain specified jurisdiction in certain cases or controversies which involve justicable issues. Intertwined with the consideration of whether or not a justiciable issue or "case or controversy" exists is a consideration of the constitutional separation of powers in our Federal system. At the very roots of this system is the concept that the Courts will not interfere with questions which are strictly political, legislative or executive in nature. The Congress of the United States establishes the broad policies of the country by law.

The only conceivable inactment which would provide for judicial review of a decision to contract services would be through the Administrative Procedures Act, but the grant of jurisdiction in the Administrative Procedures Act is not broad enough to encompass a judicial review of a decision made by the Department of Defense, reported to Congress under Section 806, upon which the Congress has made no negative response to Committee action, resolution, or legislation.

Judicial review of such agency decisions has been questioned in other litigation.

The Third Circuit Court of Appeals has determined that OMB Circular A-76, Department of Defense Directive 41004100.15, and Army Regulation 235-5 "fails to provide meaningful criteria against which a Court may analyze the Army's decision."

In this case, as in others, a District Judge would have no law to apply in determining whether or not a decision made by the agency was correct.

Section 806 is a statement of policy and legislative intent. It is a mandate from the legislative branch to the executive branch, but it is not replete with formulae or discernable guidelines against which the agency decision may be measured.

"Courts have been especially inclined to regard as unreviewable those aspects of agency decisions that involve a considerable degree of expertise or experience, or that are based upon economic projections and cost analyses, at least when the agency has broad leeway to devise the formula to be applied in any particular situation, and when there are no discernable guidelines against which the agency decision may be measured." That is a quote from the Third Circuit opinion that I mentioned a moment ago.

There were no such discernable guidelines or formulae prior to the inactment of Section 806, and it provides none. As previously determined, neither Section 806 nor its legislative history contain even the slightest indication that the Congress desires judicial review of agency decisions to contract out. Accordingly, it appears that the Administrative Procedures Act provides no basis for the judicial review of the agency decision to contract or the implementation thereof, in this case.

Also, we have been concerned with the standing of these Plaintiffs to sue. In order to pursue a cause of action as a party plaintiff, one must have a standing to sue. A right of action must exist to support any case,

but one must also be a proper party. Here, the individual plaintiffs and the organizational plaintiff have equal standing to sue or lack of same. Questions of standing to sue and the jurisdiction of Courts are among the most complex in the law. Generally, however, "standing exists if the plaintiff alleges that the challenge action has caused him injury in fact, economic or otherwise, and if the interest sought to be protected by the plaintiff is arguably within the zone of interest to be protected or regulated by the statute in question."

The clearly stated zone of interest to be protected by the statute, that is Section 806, is reserved to the Congress. The interests there are cost effectiveness, military efficiency, and the right of Congressional review and decision. Clearly, there is no inclusion of any of the plaintiffs in the zone of interest established in the statute.

Also raised, but not explored to the degree that would be necessary to base a decision upon is the issue of timeliness in the case.

Among other things contended by the Defendant is that the Plaintiffs' complaint is not timely brought. The statement of chronology brings into serious question the timing of the filing. Having known of the intended contracting procedure for months, the Plaintiffs filed a complaint on Thursday, August 21st. A jury session was then underway in the Augusta Division. Juries had been selected on August 18th for trials during that week and during the week of August 25th. Despite a heavy schedule, a hearing was set by the Court on the Plaintiffs request for a preliminary injunction and conducted on Wednesday, August 27th, 1980, and lasted, as I recall, for about one and a half or two hours and has been continued, of course, until today, the 29th day of August.

It should be noted that Pan American intervened on August 27th, 1980.

In this case, the Plaintiffs seek to enjoin a multi-million-dollar activity. This activity of the Department of Defense is scheduled to begin on September 1st, which, of course, is Labor Day, being the Monday following the Friday which is today.

The interests of the parties here are very important. The intended contracting procedure will save the Government over $20,000,000 according to the Defendant's representations. Many jobs are stake. Pan American has had the contract, although under appeal, since January of 1980.

The timeliness of the filing of the Plaintiffs' complaint, however, is not determinative here, because the Court has already concluded that it has no jurisdiction and that the Plaintiffs have no standing to sue. However, because of the potential importance of such a defense, the Court is compelled to observe, at least, that the Plaintiffs delay in filing a case with this import, with the extensive knowledge that Plaintiffs had since early 1980, is certainly an issue of glaring importance.

Whether or not there are extenuating circumstances or reasons to justify this delay is a matter for decision after an evidentiary hearing. Because of the other portions of this order, there is no necessity for an evidentiary hearing thereon.

Based upon the findings and the conclusions of law primarily which have been stated in the report of this Court, this session, and upon those considerations it appears, and I will enter today an order to this effect, with those stated findings and conclusions in the report that this District Court is without jurisdiction to proceed in the matter and that the Plaintiffs lack standing to prosecute the action. Accordingly, the application of the Plaintiffs for the issuance of preliminary injunctive relief is denied, and the case is dismissed.

I expect that the order will be entered in a very brief form, but filed before the close of Court business today.

Is there anything further?

MR. BOOTH: We have nothing.

MR. LEIDEN: We have nothing further at this time, Your Honor.

THE COURT: This Court will then be in recess.

(Hearing concluded.)

CERTIFICATE

GEORGIA:

RICHMOND COUNTY:

I hereby certify that the above and foregoing proceedings were taken down, as stated in the caption, and reduced to typewritting under my direction, and that the foregoing pages 1 through 16 represent a true, correct, and complete transcript of said proceedings.

This, the 17th day of September, 1980.

RICHARD A. DUERINGER, CCR-A-48
My commission expires the 5th day of May, 1984.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Civil Action File No. ———

AMERICAN FEDERATION of GOVERNMENT EMPLOYEES, LOCAL 2017,
and *First Plaintiff*

JOHN C. CUMMINGS,
and *Second Plaintiff*

STERLING DUNN,
and *Third Plaintiff*

JOHN E. GUILLEBEAU,
vs. *Fourth Plaintiff*

HAROLD BROWN,
and *First Defendant*

CLIFFORD ALEXANDER, JR.,
and *Second Defendant*

WILLIAM J. HILSMAN,
and *Third Defendant*

WALTER L. MORRIS, JR.,
and *Fourth Defendant*

DONN A. STARRY,
_____ *Fifth Defendant*

VERIFIED COMPLAINT FOR
TEMPORARY RESTRAINING ORDER
TEMPORARY INJUNCTION, AND
PERMANENT INJUNCTIVE RELIEF

VERIFIED COMPLAINT

1

This is an action under Public Law 96-107, Section 806(a), the Due Process clause of the V Amendment, U.S. Constitution, 28 U.S.C. 1361, and the Federal Declaratory Judgment Act, 28 U.S.C. 2201, 2202 and to declare the conversion from performance by Department of Defense Civil Service Personnel to performance by a private contractor at Fort Gordon, Georgia illegally and to order temporary and final injunctive relief barring defendants from such conversion, to order defendants to comply with duties compelled in Public Law 96-107, and such other relief as may be necessary and proper.

JURISDICTION

2

This Court has jurisdiction over this action under 28 U.S.C. 1331(a), 5 U.S.C. 701 et seq., 28 U.S.C. 1361 and 28 U.S.C. 2201, 2202.

VENUE

3

Venue is properly set in this court under 28 U.S.C. 1391(e).

PARTIES

4

Plaintiff, American Federation of Government Employees, Local 2017, is a labor organization affiliated with the American Federation of Government Employees, AFL-CIO, and represents civilian employees of the Department of the Army, Department of Defense, employed at Fort Gordon, Georgia, who will lose other full-time civil service employment and all benefits resulting from such employment or suffer a reduction in grade because commercial and industrial type functions at Fort

Gordon, Georgia have been converted to performance by a private contractor. Plaintiff, AFGE Local 2017, will suffer injury in fact by loss of membership leading to a reduction in income and erosion in the number of people it is able to represent. An affidavit of the president of AFGE Local 2017, Ronald Klementowski, verifying the statements in this complaint is attached.

5

The individual plaintiffs are civilian employees of the Department of Defense, Department of Army, at Fort Gordon, Georgia, who will suffer injury in fact by loss of full-time civil service employment and all benefits resulting from such employment, or reduction in grade because commercial and industrial type functions at Fort Gordon have been converted to performance by a private contractor, or complete loss of employment.

6

Defendant, Harold Brown, Secretary of Defense, is sued in his official capacity as head of the department in which the conversion to contract performance has occurred and as such has the authority and responsibility to correct the actions which plaintiffs assert are violations of law.

7

Defendant, Clifford L. Alexander, Jr., Secretary of the Army, is sued in his official capacity as head of the military department within the Department of Defense in which the conversion has occurred and as such has the authority and responsibility to correct the actions which plaintiffs assert are violations of the law.

8

Defendant, General Donn A. Starry, is Commanding General of the United States Army Training and Doc-

trine Command, is used in his official capacity as head of the United States Army Command which has authority over operations at Fort Gordon, Georgia where the conversion occurred and as such has the authority and responsibility to correct the actions which plaintiffs assert are violations of law.

9

Defendant, Major General Wm. Hilsman, Commander of the U.S. Army operations at Fort Gordon, Georgia, is sued in his official capacity as commander of the facility where the conversion occurred and as such has the authority and responsibility to correct the actions which plaintiffs assert are violations of law.

10

Defendant, Walter L. Morris, Jr., is the contracting Officer for Contract No. DABT-A-79-R009, is sued in his official capacity as contracting officer for the functions converted and as such has the authority and responsibility to correct the actions which plaintiffs assert are violations of law.

CAUSE OF ACTION
COUNT I

11

On June 26, 1980, a contract (Contract #DABT-A-79-R-009) was awarded to Pan American Airways, Inc., a private contractor, by the Department of Defense, Department of the Army, for performance of certain commercial and industrial type functions at Fort Gordon, Georgia.

12

On or about June 26, 1980, all individual plaintiffs received a reduction in force notice indicating that they would lose their present civil service jobs; these notices

were issued as a direct result of the award of the contract to Pan American effective September 1, 1980.

13

Plaintiffs have exhausted all administrative remedies available to challenge the propriety and legality of the conversion of commercial or industrial type functions at Fort Gordon, Georgia, from performance by Department of Defense personnel to performance by a private contractor.

14

The commercial or industrial type functions of the Department of Defense personnel at Fort Gordon, Georgia, contracted by the Department of Defense, Department of the Army, to be performed by Pan American on or about June 26, 1980, with contracting performance to commence on or about September 1, 1980, were converted to circumvent a civilian personnel ceiling in violation of P.L. 96-107, 806(a)(1) which prohibits conversion of commercial or industrial type functions of the Department of Defense performed by Department of Defense personnel to performance by a private contractor to circumvent any personnel ceiling.

COUNT II

15

Plaintiffs reallege all statement contained in paragraphs 1 through 14.

16

On or about February 5, 1980, defendants, directly and by their designees, released a cost comparison comparing the costs to the Government of performing certain commercial or industrial type functions at Fort Gordon, Georgia, by Department of Defense personnel with the costs to the Government of performing those same commercial or industrial type function by utilizing a private contractor.

17

The government in-house calculation for the function was not based on an estimate of the most efficient and cost effective organization for in-house organization performance and therefore violates P.L. 96-107, Section 806, (a) (2) (A) which requires the Secretary of Defense to certify that the government in-house cost calculation for the function is based on an estimate of the most efficient and cost effective organization for in-house performance.

COUNT III

18

Plaintiffs reallege all statements contained in paragraphs 1 through 18.

19

The individual plaintiffs have a property interest in Federal employment entitled to V Amendment due process protection.

20

The actions by defendants in converting functions to contractor performance at Fort Gordon, Georgia, in violation of Public Law 96-107, Section 806 (a) are depriving plaintiffs of property rights without due process in violation of Amendment V of the Constitution of the United States of America.

COUNT IV

21

All other statements alleged in paragraphs 1 through 20 are hereby incorporated by reference.

22

The defendants and their designees have taken the position that the cost comparison study comparing the costs of in-house performance with the cost of contractor per-

formance was within the guideline of OMB Circular A-76.

23

Paragraph 6 d (iii) of OMB Circular A-76 prohibits contracting out solely to avoid personnel ceilings.

24

Public Law 96-107, while Section 806 (a) prohibits contracting out to avoid personal ceilings, Section 806 (a) goes beyond paragraph 6 p (iii) of OMB Circular A-76 by prohibiting any outside contracting to avoid personnel ceilings, it encompasses all breaches of paragraphs 6 b (iii) of OMB Circular A-76.

25

Paragraph 9 c (1) of OMB A-76 requires that each agency assured that Government operations are organized and staffed for the most efficient performance.

26

The requirements noted in OMB Circular A-76, paragraph 9 c (1) corresponds with the legal obligations of all officials within this department under Public Law 96-107, Section (a) (2) (A) to base the in-house estimate on the most cost efficient organization.

27

The intent of Public Law 96-107, Section 806 (a) was to elevate paragraphs six d (iii) and 9 c (1) of OMB Circuar A-76 to the status of law.

28

Plaintiffs AFGE Local 2017 filed an appeal of the cost comparisons under appeals procedures set forth in OMB Circular A-76, on or about February 19, 1980. When plaintiff AFGE Local 2017, on behalf of employees af-

fected by the contracting out at Fort Gordon, Georgia, appealed the defendants' decision under OMB Circular A-76, it did not have access to information which was solely in the control of the Government.

29

Included in the information solely within the control of the Government, were documents indicating defendants' intent to contract out to void personnel ceilings.

30

Plaintiff AFGE Local 2017, by letter dated February 7, 1980 asked for information pertaining to personnel ceiling under the Freedom of Information Act.

31

Reference to the last of information pertaining to personnel ceilings was made in Plaintiff, AFGE Local 2017, appeal under OMB Circular A-76.

32

Defendants' sole control of information relevent to whether a violation of Public Law 96-107, Section 806 (a) occurred while requiring plaintiff to exhaust the only appeal rights within the agency. The withholding of such information constitutes deprivation of plaintiffs' property interest without due process of law, and violates the V Amendment of the U. S. Constitution.

WHEREFORE, Plaintiffs pray for the following relief:

a] An order, pursuant to 28 U.S.C. 2201 et.seq., declaring that the conversion of certain commercial or industrial type functions at Fort Gordon, Georgia, by Defendants from performance by Plaintiffs to performance by a private contractor violates Public Law 96-107, Section 806 (a) and the due process clause of the V Amendment of the United States Constitution;

b] An order, in the nature of mandamus, requiring Defendants to perform the following ministenal and non-discretionary duties:

1] requiring defendants to re-do the cost comparison;

2] requiring defendants to re-do the in-house organization in order to base the in-house estimate on cost efficiency.

3] requiring defendants not to contract out to avoid personnel ceilings.

4] requiring defendants not to contract out commercial or industrial functions at Fort Gordon, Georgia pending compliance with (1) and (2) above.

c] A temporary preliminary and permanent injunction restraining defendants, and their successors in office, from implementing the conversion of commercial or industrial type functions at Fort Gordon, Georgia, from performance by plaintiffs to performance by a private contractor;

d] In the alternative to temporary and permanent injunctive relief, and order directing defendants to provide the individual plaintiffs reinstatement with full back pay and pension benefits;

e] An order awarding plaintiffs the costs of this action including attorneys fees; and

f] An order granting such other and further relief as may seem just and proper and as the exigencies of this case may demand.

Respectfully submitted,

/s/ Terrance P. Leiden
TERRANCE P. LEIDEN
Attorney for Plaintiffs

330 Telfair Street
Augusta, GA 30901
404-724-8548

STATE of GEORGIA
COUNTY of RICHMOND

PERSONALLY APPEARED before the undersigned attesting officer duly authorized to administer oaths, came Ronald Klementowski, who after first being sworn, deposes and states that the facts contained in the foregoing Complaint are true and correct to the best of his knowledge and belief.

/s/ Ronald Klementowski
RONALD KLEMENTOWSKI

Sworn and subscribed before me
this 21st day of August, 1980:

Notary Public
Richmond County, Georgia